

of MDS to the Mass Media Bureau is not only appropriate, but essential.

As part of the relocation of MDS to the Mass Media Bureau, the Commission, in promulgating final rules in this proceeding, could also revise the MDS application form and exhibits required by that form, so as to delete the type of information which is irrelevant to MDS and to ease the processor's task in gleaning the necessary processing information from the form. For example, the MDS application form need not include information requests relative to other Part 21 services that are, unlike MDS, primarily common carrier services.¹⁶

As a Mass Media service, MDS applicants should be able to file applications based upon reasonable assurance of the availability of the proposed transmitter site (which is the case in other Mass Media contexts), rather than having a binding contractual arrangement (in the form of a lease or option to lease) with the property owner at the time of filing. While the Joint Commentors oppose the suggestion that MDS applicants be free to file without at least having reasonable assurance of site availability,¹⁷ the Joint Commentors believe that requiring a binding lease or lease

¹⁶ Thus, for example, the MDS application form need not contain questions relating to Section 214 authorizations, ownership and control of facilities, subscriber affiliation, tariffs, state or local franchises, or maintenance facilities.

¹⁷ Reasonable assurance should take the form of contact with the property owner or its authorized agent and at least some type of nonbinding written assurance from the owner or its agent that space is available and that the owner/agent would be willing to negotiate an appropriate lease if and when a conditional license is issued.

option at the time of filing goes beyond the need to insure that an applicant is qualified and needlessly wastes capital which could otherwise be used to benefit the public interest. Specifically, a nonbinding letter of reasonable assurance from a site owner generally does not require a payment of money by the applicant to the site owner; however, an applicant generally will have to pay cash in order to either obtain a lease option or a lease which is binding upon the site owner. Since an applicant does not and cannot know at the time of filing whether its application will or will not be mutually exclusive and will or will not be granted, it is a waste of funds for an applicant to pay cash to each and every site owner at the time of filing.

Because the Mass Media Bureau has considerable experience in applying the "reasonable assurance" standard of site availability, which experience the Private Radio Bureau lacks, the changes in the MDS application format which are likely to result from this proceeding also militate in favor of relocation of processing to the Mass Media Bureau.¹⁸

¹⁸ The NPRM, at ¶8, requests comment on whether MDS should be reclassified as a private radio service to be regulated under Part 94 and specifically whether there are benefits to MDS operators in being reclassified as private radio licensees. It would be highly detrimental to the wireless cable industry if all MDS operators were treated as common carriers and were potentially subject to state entry, exit and rate regulation. Indeed, because many state and local governments derive revenues from the franchising fees paid by wired cable systems, many state and local governments could use any ability to regulate wireless cable as a vehicle to tax wireless cable operations, a burden this emerging industry can ill-afford. However, we believe that the Commission's laudable goal (the pre-emption of such destructive state regulation) is achieved so long as MDS is removed completely from
(continued...)

VII. The Backlog of Pending Applications Can and Should Be Reduced.

The Joint Commentors support the Commission's stated goal of reducing the tremendous backlog of pending MDS applications. See NPRM at ¶5. The Commission should select among pending single-channel applicants via lottery rather than comparative hearing, and should create a comprehensive and consolidated data base prior to further processing. Only those pending applications that satisfy the present (not proposed) co-channel and adjacent channel interference criteria should be granted. To the extent that some later-filed application has been granted by final, unreviewable order, and a pending applicant failed to seek reconsideration or to petition to deny that later-filed application while it was pending, the party which has received a final, unreviewable grant should be allowed to retain its license and the party which has only a pending application should not be deemed to have been deprived of its Ashbacker rights, since it slept on those rights by not opposing the grant of the later-filed application. The Commission should process first those applications filed by conditional licensees seeking additional channels, so that those licensees may construct on multiple channel groups simultaneously.

The Joint Commentors support the proposal to treat falsification of an entitlement to a preference as an abuse of the

¹⁸(...continued)
the Common Carrier Bureau. Whether MDS is classified as a mass media service or as a private radio service, under the Communications Act of 1934 as amended ("Act"), 47 USC §151 et seq., MDS operators would be exempt from state regulations. See Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

Commission's processes. However, it is not sufficient for the Commission to merely treat such falsification as "a reflection on an applicant's basic qualifications for licensing." The Commission should state unequivocally that such falsification shall create a presumption, rebuttable only by clear and convincing evidence, that such a falsifier is unqualified to hold any FCC license and that all licenses and applications of such a falsifier will be designated for hearing with revocation being the only acceptable penalty in such a hearing.

The Joint Commentors oppose the proposal, NPRM at ¶26, to select licensees by lotteries held for service areas defined by MSAs or RSAs. The MDS service is different than the cellular radio service, the service in which MSA and RSA boundaries were first utilized. Cellular is a mobile service, where a subscriber generally travels widely over highways within a given area and requires service anywhere he or she is traveling. Also, cellular competes for subscribers with paging, and therefore needs extremely wide-area coverage in order to compete with the many wide-area paging services offered by licensees under Parts 22 and 90 of the Commission's rules. In contrast, MDS is a fixed service, delivering video entertainment to the home. Moreover, the competition for MDS, i.e., traditional wired cable services, generally hold franchises for areas which conform more in size to a 30-mile radius of an MDS transmitter, rather than the much larger service areas which generally apply in the cellular and paging context.

For example, the Los Angeles MSA covers tens of thousands of square miles with a 1990 census population of 13,862,513, stretching all the way from the Pacific Ocean to the Nevada and Arizona borders. It includes not only Los Angeles, Long Beach, Huntington Beach, Santa Monica, Malibu, and Newport Beach on the west, and Pasadena, Burbank, Lancaster, Anaheim, Santa Ana, Riverside and San Bernardino east and north of the central city, but also Barstow, Palm Springs, Rancho California and Twentynine Palms (all well over an hour's drive from Los Angeles). And this list does not include the communities within the MSA that are on or near the Colorado River, communities such as Blythe (225 highway miles from central Los Angeles) and Needles (273 highway miles from central Los Angeles).¹⁹ One would need literally dozens of full-power transmitters to cover this vast area, which is smaller in size than some RSAs. There are numerous and disparate wired cable franchises and radio and television broadcasters serving numerous separate and distinct viewing markets within the Los Angeles MSA.²⁰ It makes no more sense to award wireless cable licenses on an MSA or RSA basis than it would to award traditional broadcast licenses in that manner.

¹⁹ For comparison, it is 237 highway miles from Washington, D.C. to New York City.

²⁰ Patently, the capital cost of building out an entire MSA or RSA is too great in other entertainment delivery contexts, such as cable television, for one entity to swallow, which is why separate and distinct entertainment delivery markets exist within a single MSA or RSA. It is too great for wireless cable operators too. If the Commission decided to require an "MSA-wide" MDS licensee to build out the entire MSA market, the Commission likely would be violating Section 307(b) of the Act, which requires an equitable distribution of spectrum across the country.

VIII. Conclusion.

The Joint Commentors wholeheartedly support the Commission's stated goals as set forth in NPRM. The Joint Commentors favor the proposals in the NPRM: 1) to shift MDS regulations to the Mass Media Bureau; 2) to create a consolidated ITFS/MDS data base; 3) to preclude state entry, exit and rate regulation of MDS; 4) to sanction those who submit false preference requests; and 5) to reduce the existing backlog by conducting lotteries in lieu of comparative hearings.

The Joint Commentors oppose the proposal to eliminate the present carrier/interference ratio standard and to replace it with either a strict mileage separation standard or a mileage separation height/power table. The disruption this proposal will cause to wireless cable by eliminating the potential for additional channel capacity far outweighs any limited administrative convenience it might prospectively create for the FCC processing staff. Once the Commission completes the consolidated ITFS/MDS data base, the Commission will be able to formulate a simple and workable computer program enabling its processing staff to apply the current C/I ratio standard accurately and expeditiously. Therefore, the proposed strict mileage separation standard will not significantly improve the Commission's processing functions. It is far more important to the public interest to ensure that currently licensed four-channel MDS systems are able to add additional channel capacity from other channel groups which could be utilized under the current standards.

If the Commission does move to either the proposed strict mileage separation standard or the proposed mileage separation table, it should apply the new standard only to future applications, not to those pending prior to the issuance of the NPRM. Retroactive application of a new interference standard would subject tentative selectee's applications to dismissal on the basis of administrative convenience. Such an action could easily be construed to be arbitrary and capricious and could lead to protracted litigation.

The Joint Commentors vigorously oppose the proposal to allow any newly constructed MDS system to be shut down summarily and indefinitely upon complaint by an ITFS operator. ITFS operators are sufficiently protected by requiring that in the event of harmful interference the MDS licensee pay the reasonable cost of upgrading ITFS equipment, and by holding out the prospect of post-hearing revocation of the license of a recalcitrant MDS licensee.

The Joint Commentors encourage the Commission, as part of the movement of MDS to the Mass Media Bureau, to streamline the MDS application form and to replace the current requirement of binding site lease contracts with the "reasonable assurance" requirement currently applied to other Mass Media applicants. The Joint Commentors suggest that the Commission direct the staff to attempt to grant applications for different channel blocks in the same geographic area as closely together timewise as feasible.

The Joint Commentors believe that if the Commission goes




modifications suggested in these Comments, the Commission will have advanced in a material way the viability and competitiveness of wireless cable as a vehicle for delivery of video programming to the home while at the same time protecting the integrity of the ITFS.


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